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In The

Supreme Court of the United States

RICKY MARTIN LLOYD WALTERS,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States; IMMIGRATION AND NATURALIZATION SERVICE; and JOHN BULGER, District Director, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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REASONS FOR GRANTING THE PETITION

I. The Interlocutory Posture Of The Instant Case Does Not Defeat Certiorari Where The Issues To Be Resolved Implicate The Constitutional Requirement Of Habeas Review And Where Disposition Of Mr. Walters' Habeas Case Has Been Finally Resolved By The Second Circuit's September 26, 2006 Summary Order

As an initial matter, the summary order of the Second Circuit is not immunized from review merely because it does not completely resolve all issues in the present case. Additionally, the summary order is final and the case is not interlocutory as to the specific issue raised by this petition for writ of certiorari: Mr. Walters' habeas proceedings. The appeal of the grant of habeas relief that was pending in the Second Circuit as of the time of the passage of the Real ID Act now has been extinguished. The appeal was improperly converted into a petition for review pursuant to 8 U.S.C. § 1252. Moreover, transfer of the instant case to the Eleventh Circuit, as the Second Circuit has ordered, could be tantamount to denying Mr. Walters any relief given the procedural posture of this case. In the absence of the habeas order granting relief by the federal District Court, the Eleventh Circuit may simply reinstate its prior order of January 30, 2003, where it held that it lacked jurisdiction to consider Mr. Walters' claims under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 309(c)(4)

and (4)(G), 110 Stat. 3009-626 (8 U.S.C. § 1101 note). *See* 11th Cir. Order attached to Petition for Writ of Certiorari, App. 13-14.

As Respondents concede, *see* Resp. at 14, this Court has unquestioned jurisdiction to review judgments of appellate courts even of an interlocutory nature. *See* 28 U.S.C. § 1254(1) (providing that cases may be reviewed "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . "). In *Forsyth v. Hamilton*, 166 U.S. 506 (1987), the Court affirmed that "[u]nquestionably, the generality [of the provision authorizing review of federal appellate decisions] was not a mere matter of accident. It expressed the thought of congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. *The power thus given is not affected by the condition of the case as it exists in the court of appeals.*" *Id.* at 513 (emphasis added). The Court further stated that its jurisdiction "may be exercised before or after any decision by that court, and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the circuit court of appeals. . . ." *Id.*

It is settled that the interlocutory nature of a case should not impede the granting of certiorari where, as here, the order of the court below has decided an important issue, otherwise worthy of review, and this Court's intervention will serve to hasten the resolution of the litigation. *See, e.g., F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S.

155 (2004); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *see, generally, Gressman, et al., Supreme Court Practice* § 4.18 (9th ed. 2007).

In *F. Hoffmann-La Roche, Ltd.*, for example, plaintiffs brought an antitrust class action on behalf of foreign and domestic purchasers of vitamins, alleging an international price-fixing conspiracy by manufacturers and distributors. 542 U.S. at 159. The district court dismissed the suit as to foreign purchasers for lack of subject matter jurisdiction, and those plaintiffs appealed. On appeal, a divided panel of the court of appeals reversed the district court, and found that the "domestic-injury" exception to the Foreign Trade Antitrust Improvements Act exclusionary rule applied. *Id.* at 160. This Court granted certiorari, even though the case was of an interlocutory nature.

This Court has also granted certiorari in cases requiring the review of important *jurisdictional* questions, such as exist presently relating to the application and interpretation of the Real ID Act. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686 (1949) (holding that where an action is such as to create a personal liability of a governmental officer, whether sounding in tort or in contract, the fact that officer is an instrumentality of sovereign does not forbid a court from taking jurisdiction over suit against him); *Land v. Dollar*, 330 U.S. 731, 735

(1947) (where question of District Court's jurisdiction is raised either by party or by court on its own motion, court may inquire by affidavit or otherwise into facts as they exist).

In both *Larson* and *Land*, this Court consented to review prior decisions where the court of appeals had reversed the granting of a motion to dismiss and ordered the cases to be remanded for trial. *See Larson*, 337 U.S. at 685 n.3; *Land*, 330 U.S. at 734 n.2. Analogous to the procedural posture in *Larson* and *Land*, the Second Circuit below determined that the instant case could proceed by being transferred to another circuit court of appeals. Here, however, there is an even more persuasive reason for granting certiorari due to the important jurisdictional questions relating to the Second Circuit's interpretation of the Real ID Act. Certiorari is thus warranted even despite the interlocutory nature of the instant case.

II. Respondents Have Alleged, Without Any Statistical Or Other Evidence, That The Issues In The Present Petition For Certiorari Affect Only A "Small Number" Of Aliens

Respondents argue, *see* Resp. at 15-16, that the instant petition for certiorari implicating the Constitutional requirement of habeas corpus "would be unlikely to affect more than a small number of cases." *Id.* at 16. However, Respondents have provided no statistical evidence or other reliable indicia that would support their position that only a small number of

cases could be implicated. While it is true that the number of cases which would be affected is a "closed set," given that habeas petitions will no longer be filed in the district courts after passage of the Real ID Act, this in and of itself does *not* mean that only a small number of aliens will be affected. There certainly were and are many persons adversely affected by courts' interpretation of the Real ID Act to preclude habeas where the appeals of their pending habeas cases were impermissibly converted into petitions for review, even though the appeals were pending at the time of passage of the Real ID Act.

Respondents argue, *see* Resp. at 16, that all courts of appeals considering the issue have reached the conclusion that habeas appeals pending in the courts of appeals at the time of the Real ID Act's enactment, i.e., May 11, 2005, should be converted into petitions for review, in contravention of the Act's plain language. However, it is axiomatic to the functioning of an ordered society that an infinity of improper decisions does not convert an improper interpretation of the law into a valid one merely because there exists a consensus based on error. As this Court has stated, "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). Even assuming *arguendo* that courts of appeals in the past have converted appeals of habeas decisions pending on May 11, 2005 to petitions for review, those decisions

fly in the face of the plain language of the Real ID Act, § 106(c). *See id.* (providing that to be converted an alien's habeas case must have been "*pending* in a district court on the date of the enactment") (emphasis added). An interpretation of the law by judges which unilaterally extinguishes habeas review without prior express Congressional authorization endangers the principles animating the judiciary's commitment to the rule of law. *See Marbury v. Madison*, 1 Cranch 137, 166, 2 L.Ed. 60 (1803), and its progeny.

III. There Is No Final Order Of Removal In The Present Case Because That Order Was *Vacated* Pursuant To The District Court's Grant Of Habeas Corpus On October 31, 2003

Respondents maintain, *see* Resp. at 16-18, that although there is no final order, the Second Circuit's summary order below does not conflict with other courts of appeals' decisions which have held that the Real ID Act does not apply where a final order does not exist. *See, e.g., Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005); *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1366 (11th Cir. 2006); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2005); *Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005).

Respondents find it unimportant that Petitioner no longer has a valid order of removal. Respondents then state *incorrectly* that "*Petitioner* continues to seek 'judicial review of an order of removal.'" Resp. at

18 (emphasis added). This is not the case. Respondents have mischaracterized Petitioner's case as one seeking review of a non-existent final order of removal. As a result of this misunderstanding, Respondents *incorrectly* conclude that the case should fall within 8 U.S.C. § 1252(a)(5), providing that the courts of appeals are the exclusive means for judicial review of an order of removal.

Respondents' argument on this point represents a basic misconception of Petitioner's case. Mr. Walters *never appealed* the decision of the District Court's order dated October 31, 2003, *because he was granted habeas relief*. Therefore, he *never sought* in the Second Circuit *and no longer seeks* review of any order of removal. Respondents have engrafted their position onto Petitioner's. In other words, it is the *government* which is seeking further review of (a now vacated) order of removal in the form of a petition for review. The subject matter of the Second Circuit's summary order is the *government's* petition for review, and not Mr. Walters'. As such, there is no question that *Petitioner* does not seek review of any final order of removal and thus the reasoning of the *Ali-Madu-Nadarajah-Hernandez* line of cases, as discussed in the original petition for certiorari, *see* Pet. at 19-22, should be followed.

IV. Respondents Have Ignored The Plain Language Of The Real ID Act, Section 106(c), And Failed To Address The Requirement That There Must Be Clear And Convincing Evidence Of Congressional Intent Before Habeas Review May Be Extinguished

Respondents, *see* Resp. at 18-21, have sidestepped the most important threshold issue in this case concerning the plain language of the Real ID Act. Respondents do not take into account the fact that the Act provides for the transfer of cases to the courts of appeals and conversion of habeas cases to petitions for review *only when* the habeas case is "*pending* in a district court on the date of enactment." Real ID Act, Section 106(c), Pub. L. 109-13, Div. B, Title I, May 11, 2005, 119 Stat. 311 (emphasis added). Respondents do not dispute the fact that Mr. Walters' case clearly was *not* pending in the district court as of May 11, 2005, because his petition for writ of habeas corpus had been granted by the District Judge on October 31, 2003.

Respondents also do not address the fact that where language of a statute is clear on its face, inquiry into Congressional intent is not required. *INS v. Phinpathya*, 464 U.S. 183, 195-96 (1984). In the present case, the plain language of the Act is clear and unequivocal on its face in that it does not provide for transfer or consideration of a case as a "petition for review" where the case is no longer pending before a district court. Nor do Respondents consider the

effect of Supreme Court precedents which *require* clear and convincing evidence of Congressional intent before the right to habeas review may be extinguished. *See INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001); *Felker v. Turpin*, 518 U.S. 651, 652 (1996); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868). Here, the Second Circuit's summary order conflicts with these precedents. Such a conflict is sufficient to warrant the grant of certiorari. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (certiorari granted on claimed "conflict in principle"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 733, 764 (1985) ("appeared to conflict in principle"). These precedential decisions, especially, *INS v. St. Cyr*, *supra*, remain unaddressed in Respondents' brief.

V. The Second Circuit's Summary Order Conflicts With this Court's Prior Case Law Requiring Weighing Of Traditional Venue Considerations

Respondents, *see* Resp. at 21-22, also do not address the fact that the Second Circuit's summary order conflicts with *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), requiring that the traditional venue considerations must be weighed before ordering transfer. Although it is apparent that 8 U.S.C. § 1252(b)(2) is a venue provision, *see* Resp. at 22, they do not cite or address *Braden* in any way. It is clear from this Court's precedents that the

traditional venue considerations must be considered, including: (1) where all of the material events occurred; (2) where the records and witnesses pertinent to the claim are likely to be found; (3) the convenience of the forum to the respondent and petitioner; and (4) the familiarity of the court with the applicable laws. *Braden*, 410 U.S. 484 at 493, 500. The Second Circuit plainly failed to apply these considerations and transferred venue based on a single factor: whether "manifest justice" would result. App. 5.

Respondents are simply incorrect that the failure of the Second Circuit to comply with this Court's decision in *Braden* should not be a factor in the decision to grant certiorari review. Pursuant to Rule 10 of the Supreme Court rules, certiorari may be granted where a "United States court of appeals has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). To justify a grant of certiorari, the conflict must be direct and must be readily apparent from the court of appeals' rationale or result. *United States v. Bass*, 536 U.S. 862, 864 (2002) (certiorari granted because the Sixth Circuit's decision below contrary to *United States v. Armstrong*, 517 U.S. 456 (1996); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1996) (certiorari granted where "Ninth Circuit's holding is in direct conflict with out precedents"); *see, generally, Gressman, et al., Supreme Court Practice* § 4.5 (9th ed. 2007).

In cases where the court of appeals, as here, fails to apply a prior Supreme Court precedent because of

error or oversight, this Court usually grants certiorari. *See, e.g., Fellers v. United States*, 540 U.S. 519 (2004) (failure to apply *Massiah v. United States*, 377 U.S. 201 (1964)). There is a long history of granting certiorari in such cases. *See id.*; *see also Horn v. Banks*, 536 U.S. 266 (2002); *Ohio v. Reiner*, 532 U.S. 17 (2001); *Flippo v. West Virginia*, 528 U.S. 11 (1999); *Maryland v. Dyson*, 527 U.S. 465 (1999); *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998); *Hetzel v. Prince William Co., Va.*, 523 U.S. 208 (1998); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *SEC v. Otis & Co.*, 338 U.S. 843 (1949); *FCC v. Broadcasting Serv. Org., Inc.*, 337 U.S. 901 (1949).

In the present case, certiorari is warranted on multiple grounds. First, under S. Ct. R. 10, Petitioner has shown that the Second Circuit has decided an important question of federal law, regarding the Real ID Act and its effect on habeas review, which has not been, but should be, settled by this Court. S. Ct. R. 10(c). Furthermore, the court of appeals entered its summary order in conflict with other courts of appeals' decisions holding that the Real ID Act does not apply in cases where there is no longer any final order of removal. S. Ct. R. 10(a). Lastly, the court of appeals decided an important federal question, concerning application and interpretation of the venue provision under 8 U.S.C. § 1252(b)(2) in a way that conflicts with relevant decisions of this Court. S. Ct. R. 10(c).

CONCLUSION

For all these reasons, this Court's certiorari review is warranted and the petition for writ of certiorari should be granted.

Respectfully submitted,

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